

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK X**

VARSITY BRANDS, INC., VARSITY SPIRIT  
FASHIONS AND SUPPLIES, INC. and  
VARSITY SPIRIT CORPORATION,

09-cv-01795 (PKC)

Plaintiffs,  
-against-

**ANSWER  
JURY DEMAND**

J&M SPIRIT WEAR, INC. and  
LOUIS D. HERNANDEZ,  
Defendants.

\_\_\_\_\_ **X**

Defendants, J&M Spirit Wear, Inc and Louis Hernandez by and through its undersigned counsel, file this answer to Plaintiffs' first amended complaint.

**NATURE OF ACTION**

1. Defendants admit Plaintiffs have filed a civil action alleging copyright infringement, trademark infringement, false advertising and unfair competition, but Defendants deny the same.

**THE PARTIES, JURISDICTION AND VENUE**

2. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same.
3. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same.
4. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same.
5. Denied.
6. Denied.
7. Denied.
8. Denied

**FACTUAL BACKGROUND**

**Varsity's Original Designs and Catalogs**

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

15. Denied.

16. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

**Varsity's MOTIONFLEX Mark**

17. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

18. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

19. Denied.

20. Denied.

**Defendants' Infringing Activities**

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

**FIRST CLAIM FOR RELIEF**  
**(Copyright Infringement)**

27. Denied.

28. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

**SECOND CLAIM FOR RELIEF**  
**(Copyright Infringement)**

34. Denied

35. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

**THIRD CLAIM FOR RELIEF**  
**(Copyright Infringement)**

41. Denied

42. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

**FOURTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

48. Denied

49. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied

**FIFTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

55. Denied.

56. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

**SIXTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

62. Denied.

63. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

**SEVENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

69. Denied

70. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

**EIGHTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

76. Denied

77. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

**NINTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

83. Denied.

84. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same Denied.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied

**TENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

90. Denied.

91. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

96. Denied

**ELEVENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

97. Denied.

98. Defendants are without sufficient information and knowledge to admit or deny  
and therefore deny the same Denied

99. Denied

100. Denied

101. Denied.

102. Denied

103. Denied

**TWELFTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

104. Denied

105. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same

106. Denied

107. Denied

108. Denied.

109. Denied

110. Denied.

**THIRTEENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

111. Denied.

112. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same.

113. Denied.

114. Denied.

115. Denied.

116. Denied

117. Denied.

**FOURTEENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

118. Denied.

119. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same.



120. Denied.

121. Denied.

122. Denied.

123. Denied.

124. Denied.

**FIFTEENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

125. Denied.

126. Denied.

127. Denied.

128. Denied.

129. Denied.

130. Denied.

131. Denied.

**SIXTEENTH CLAIM FOR RELIEF**  
**(Copyright Infringement)**

132. Denied.

133. Defendants are without sufficient information and knowledge to admit or deny and therefore deny the same.

134. Denied.

135. Denied.

136. Denied.

137. Denied

138. Denied

**SEVENTEENTH CLAIM FOR RELIEF**  
**(Trademark Infringement)**

139. Denied.

140. Denied.

141. Denied.

142. Denied.

**EIGHTEENTH CLAIM FOR RELIEF**  
**(False Advertising)**

143. Denied.

144. Denied

145. Denied.

**NINETEENTH CLAIM FOR RELIEF**  
**(Common Law Unfair Competition)**

146. Denied.

147. Denied

148. Denied

149. Denied

150. Denied

**AFFIRMATIVE DEFENSES**

1. The Court lacks personal jurisdiction over the Defendants.
2. Venue is improper in the Southern District of New York.

3. The First Amended Complaint fails to state a cause of action upon which relief can be granted.
4. Plaintiffs' claims are barred by the doctrine of laches.
5. Plaintiffs' claims are waived.
6. Plaintiffs' claims are barred by the applicable statute of limitations.
7. Plaintiffs' claims are barred because of unclean hands and that Plaintiffs are not entitled to equitable relief on that basis.
8. Plaintiffs' claims are barred by acquiescence.
9. The relief sought by Plaintiffs' is barred by the doctrine of estoppel.
10. The Plaintiff's alleged copyrights are functional utilitarian clothing, useful articles, and not copyrightable subject matter under 17 U.S.C. § 101.
11. Plaintiffs' copyrights in and to the designs are invalid and unenforceable because the Plaintiff has committed fraud on the copyright office.
12. Plaintiffs' copyrights in and to the designs are invalid and unenforceable because the Plaintiff has committed copyright misuse.
13. Plaintiffs' copyrights in and to the designs are invalid and unenforceable and that Plaintiffs' copyright claims are barred on that basis.
14. Plaintiffs' claims for copyright infringement are invalid under the doctrine of fair use.
15. Plaintiffs' have not suffered injury to their business or property by reason of any conduct of Defendants that violated the trade dress or copyright laws or any other legal duty.

16. Plaintiffs' claims of copyright infringement are invalid as their alleged designs are not separable from the clothing at issue.

### **COUNTERCLAIM**

#### **Counterclaim for Declaratory Judgment**

Defendants hereby allege on information and belief that:

1. Defendants repeat, re-allege and incorporate each and every other allegation against Plaintiffs in this Answer
2. All Plaintiffs' purported copyrights are in uniform designs for cheerleading uniforms.
3. All such uniforms and designs are functional and not copyrightable under 17 U.S.C. § 101.
4. Any alleged copyright in uniform designs are not separable from the utilitarian function of the uniforms.
5. Plaintiff committed fraud on the copyright office because Plaintiff did not inform the copyright office that their alleged designs were inseparable from the function of the cheerleading uniforms and, in fact, affirmatively stated that such designs were separable, when they knew they were not.
6. Plaintiff has committed copyright misuse.
7. Plaintiff has not suffered any injury to their business or property.
8. Defendants seek a declaratory judgment pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 that its use of design elements in "cheerleading uniforms", is protected by the doctrines of nominative fair use,

functionality, and lack of originality, and hence as uniforms do not infringe any trademark rights of Plaintiff.

9. Based on the foregoing allegations, there exists between the parties a substantial controversy of sufficient immediacy and reality to warrant declaratory relief.
10. Defendant is informed and believes and based upon such information and belief alleges that Plaintiff's motivation was not to protect its copyrights. Instead, Plaintiff seeks to interfere with Defendant's business.
11. Defendant is entitled to bring this action to determine non-infringement because Defendant has a real and reasonable apprehension that it will be subject to liability.

**SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF  
UNDER THE NEW YORK STATE DECLARATORY JUDGMENT ACT**

1. Defendants repeat re-alleges and incorporates each and every allegation contained the preceding paragraphs 1-33 of this complaint herein by reference.
2. J&M Spirit Wear has a reasonable apprehension of being a defendant in an infringement suit brought by Varsity Brands, Inc., as it is a Defendant now.
3. There exists, therefore a justifiable controversy between Plaintiff and Defendants. Unless this issue is resolved by the Courts, Plaintiffs will continue alleging that Defendant infringes Plaintiff's rights.

**PRAYER FOR RELIEF**

For the above stated reasons, Defendants ask for judgment against Plaintiffs that:

(a) Plaintiffs' alleged copyrights in 2-dimensional artwork and fabric designs for cheerleading uniforms are invalid and unenforceable, as inseparable from the utilitarian function of both the clothing and its functional components.

(b) Defendants have the right to continue its business distributing their cheerleading uniforms in the United States.

(c) Injunctive relief restraining the Plaintiff, their agents, servants, employees, successors and assigns, and all others in concert and privity with them, from bringing any copyright infringement lawsuit or threat against Defendants or any other person or entity in business relation with Defendants, in connection with such cheerleading uniform designs.

(d) Declaration that Plaintiff has not been damaged by the aforesaid activities of Defendants.

(e) That this Court award Defendant reasonable attorney fees and costs.

(f) Such other relief the Court deems just and proper.

**JURY DEMAND**

Defendant hereby demands a trial by jury on all triable issues.

Dated: December 3, 2009

Respectfully Submitted,

FELDMAN LAW GROUP, PC

By: /s/Steven M. Crosby/s/  
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Kenneth S. Feldman (KF-6003)  
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*Attorneys for Defendants*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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VARSITY BRANDS, INC., VARSITY SPIRIT  
FASHIONS AND SUPPLIES, INC. and VARSITY  
SPIRIT CORPORATION,

Plaintiffs,

09 Civ. 1795 (PKC)

ECF Case

-against-

J&M SPIRIT WEAR, INC. and LOUIS D.  
HERNANDEZ,

Defendants.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of December, 2009, a true and correct copy of the foregoing ANSWER was served on counsel for Plaintiffs by ECF:

Arlana Cohen  
COWAN LIEBOWITZ & LATMAN, P.C.  
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New York, NY 10036-6799

/s/Steven M. Crosby/s/  
Steven M. Crosby